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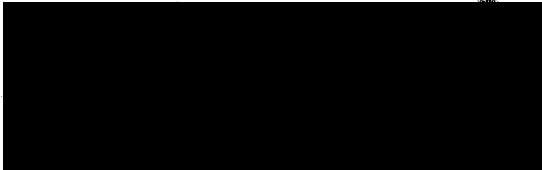
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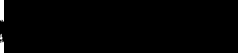
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: SEP 09 2004

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a financial analyst. He seeks to employ the beneficiary permanently in the United States as a compliance officer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits additional financial information and asserts that he has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$33.77 per hour, which amounts to \$70,241.60 annually. The ETA 750B, signed by the beneficiary, indicates that he has worked for the petitioner since November 1998.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted a partial copy of his Form 1040, U.S. Individual Income Tax Return for 2001, consisting only of Schedule C, Profit or Loss from Business. It shows that the petitioner declared a net profit of \$80,147 in 2001.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 30, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that the evidence of his continuing ability to pay the beneficiary's proffered wage shall be in the form of annual reports, federal tax returns, or audited financial statements. The director also specifically requested the petitioner to submit complete copies of his 2001 and 2002 tax returns, as well as an itemized list of monthly living expenses for 2001 and 2002. The director further advised the petitioner that he could submit copies of the 2001 and 2002 Wage and Tax Statements (W-2s) issued to the beneficiary to show the amount of wages that the petitioner had paid the beneficiary.

In response, the petitioner submitted a copy of his individual tax return for 2001. It shows that he files jointly with his spouse and declares one dependent exemption. The tax return confirms that he declared \$80,147 in business income and reported \$90,805 in adjusted gross income. It also shows that he had \$145,343 in gross receipts or sales, and reported no wages paid and no labor costs. In his cover letter, dated July 31, 2003, the petitioner states that he has not yet filed his 2002 tax return, which had been extended to October 2002. He adds that he is willing to provide a copy of his 2002 tax return as it becomes available. He also encloses a list of monthly expenses and copies of the beneficiary's individual tax returns for 2001 and 2002. The petitioner did not submit any W-2s or Form 1099s (non-employee compensation) issued to the beneficiary. The expense list reflects that in 2001, the petitioner and his household spent \$3,397 per month, or \$40,764 per annum, as living expenses.

The beneficiary's individual tax returns for 2001 and 2002 both include Schedule C, Profit or Loss from Business. The beneficiary's name is given as the sole proprietor and his principal business or profession is listed as a "financial assistant." Schedule C in both years lists the same address as the petitioner's address as the business address. The beneficiary reported \$27,438 in gross receipts or sales and a net business profit of \$16,369 in 2001. In 2002, he declared \$37,671 in gross receipts or sales and \$24,089 in net business profit.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 24, 2003, denied the petition. Upon review of the petitioner's 2001 tax return, the director concluded that after deducting the petitioner's annual living expenses from the petitioner's adjusted gross income, the remaining amount was over \$20,000 less than the beneficiary's proffered wage.

On appeal, the petitioner asserts in his transmittal letter, dated November 24, 2003, that he has had the ability to pay the beneficiary the full proffered wage. He also states that he expects his income to increase in the next twelve months and has a credit line, if needed. The petitioner also submits additional evidence of his ability to pay the beneficiary's proffered wage of \$70,241.60. He provides no further clarification, but submits copies of portfolio statements from Quick & Reilly and Primerica showing cumulative balances of about \$11,500 and approximately \$23,400, respectively, as of December 31, 2001. Of the Primerica accounts, two show ending balances totaling approximately \$5,922 as of December 31, 2002, and two show balances of approximately \$7,476 as of November 2003. A copy of a Salomon Smith Barney stock investment plan statement, dated November 22, 2002, shows 36.4214 shares for available for sale.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the evidence raises questions as to the arrangement that the petitioner and beneficiary have been operating under at the petitioner's address. No corroboration of any actual payment to the beneficiary from the petitioner has been demonstrated by the petitioner's correspondence or 2001 tax return showing neither payment of labor costs or wages. Thus, the AAO concurs with the director in concluding that Schedule C of the beneficiary's tax returns are insufficient, standing alone, to credit the petitioner with any compensation paid to the beneficiary during the relevant period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial

precedent. [REDACTED] v. *Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the petitioner's itemized list of monthly expenses for 2001 was submitted for consideration. After deducting the \$40,764 from the petitioner's adjusted gross income of \$90,805, the remaining sum of \$50,041 was \$20,200.60 short of the proffered wage in 2001. The petitioner's additional evidence, submitted on appeal, appears to address this shortfall, at least as to 2001. As noted above, the balances in the petitioner's portfolio accounts, as of the end of December 31st, would seem to be sufficient to cover the difference between the proffered wage and amount remaining available after deducting the petitioner's living expenses. The evidence does not clearly establish, however, that for subsequent periods, the petitioner's funds would be sufficient to cover the proffered wage, as the petitioner failed to provide any further tax returns or audited financial statements to properly review his financial picture subsequent to 2002. Notwithstanding the petitioner's assurances that his income will show a substantial increase, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage through federal tax returns, audited financial statements, or annual reports. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

It is noted that CIS will not treat a line of credit as a cash asset as it represents only an institution's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a given period. A line of credit is not a contractual or legal obligation on the part of a bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Similar to a credit limit on a credit card, it represents a potential debt that will increase an entity's liabilities.

The petitioner failed to submit evidence sufficient to demonstrate that he has had the continuing ability to pay the proffered wage subsequent to 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.


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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.